

Supreme Court, U.S.
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No. [] OFFICE OF THE CLERK []

IN THE
Supreme Court of the United States

RANDALL RE and ANTHONY CALABRESE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the one-time purchase of an out-of-state good is sufficient to prove that a business is actively engaged in interstate commerce to show that an alleged extortion affected interstate commerce as required by the Hobbs Act by relying on the "depletion of assets theory".
2. Whether a District Court may properly consider post-sentencing events and conduct in determining whether it would reimpose its original sentence upon a *Booker* remand.
3. Whether enhancing a sentence on the basis of a judge-found fact in violation of the Sixth Amendment is structural error and thus not subject to harmless-error review.

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Petitioners Anthony Calabrese and Randal Re ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinions affirming the District Court's conviction under the Hobbs Act and remanding for a further consideration of the Petitioners' sentences is reported at *United States v. Re*, 401 F.3d 828 (7th Cir. 2005) ("Re I") (App. 1 – 17). The Seventh Circuit's opinion affirming Petitioners' sentences after remand is reported at *United States v. Re*, 419 F.3d 582 (7th Cir. 2005) ("Re II") (App. 18 – 21).

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on August 12, 2005. On application to a Justice of this Court, Justice Stevens, the time for filing a petition for writ of certiorari was enlarged until November 23, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1951 (the "Hobbs Act") states:

- (a) Whoever in any way or degree obstructs, delays, or

affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

This case also presents a question under the Sixth Amendment of the Federal Constitution.

STATEMENT OF THE CASE

On November 1, 2002, a jury convicted Petitioners of two counts -- conspiracy to commit extortion in violation of 18 U.S.C. § 1951, and conspiracy to travel to commit extortion in violation of 18 U.S.C. §1952.

The District Court sentenced Petitioners to 87 months on Count One and 60 months on Count Two based on enhancements found by the judge by a preponderance of the evidence. Petitioners' Base Offense Level score prior to the enhancements was an 18, which allows for a possible Guideline sentence of 27-33 months. The following enhancements, found by the Judge by a preponderance of the evidence, raised the Appellants score to 27 and allowed the District Court to sentence Petitioners to 87 months on Count One and 60 months on Count Two:

- A 2-level enhancement based on a finding that the offense involved an express/implied threat of death or bodily injury (*Re I*, App. 15);

- A 4-level enhancement based on a finding that a dangerous weapon was "otherwise used" (*Id.*);
- A 3-level enhancement based on a finding that the victim sustained injuries that fall between the categories of "bodily injury" and "serious bodily injury" (*Id.*).

Petitioner Re filed a timely notice of appeal on April 22, 2003 and Petitioner Calabrese filed a timely notice of appeal on April 24, 2003. On appeal Petitioners argued, *inter alia*, that the Government did not sufficiently prove that Petitioners' attempted extortion affected interstate commerce as required by the Hobbs Act and that Petitioners' sentences were too harsh. Post-argument, Petitioners were granted leave to address the constitutionality of their sentences after *Blakely* and *Booker*.

Petitioners argued that a one-time, undated purchase of an out-of-state weed eater that could have occurred at any point over the course of a twenty-year period was not sufficient to demonstrate that the victim's business was actively engaged in interstate commerce under the depletion of assets theory relied upon by the Government. Petitioners' further argued that the victim's uncorroborated, undetailed testimony regarding purchases of gas, paint, and tools that were not shown to have been made by the business nor shown to come from out of state is too indefinite to be relied upon by the jury.

The Seventh Circuit denied Petitioners' appeal on March 31, 2005, but remanded the case in accordance with its decision in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005) after finding that Petitioners' sentences were imposed unconstitutionally. See *Re I*, 401 F.3d at 836.

In denying the Petitioner's appeal in relation to the Hobbs Act issue, the Seventh Circuit stated that "The evidence relied upon by the government indeed pushed the jury's inferential powers to the outermost limits," and found "it particularly troubling that the government never affirmatively established

when and with what funds Leach acquired the weed eater, gas, paint, and tools. Nor did the government present any direct evidence that the gas, paint, and tools used by Leach to maintain the warehouse had traveled in interstate commerce." *Re I*, 401 F.3d at 835.

On limited remand, the District Court found that it would have sentenced Petitioners to 87 months even if the Guidelines were advisory at the time of sentencing. *Re II*, 419 F.3d at 583, App. 19. Based on the record submitted by Petitioners, however, the District Court stated: "[i]f post-sentencing events and conduct were properly to be considered, I cannot honestly say whether or not the sentences would remain the same. In fact, they well may not be. *Re II*, 419 F.3d at 583, App. 19. Nonetheless, the District Court excluded the post-sentencing evidence based on its interpretation of the limited remand provided for by the *Paladino* decision.

On August 12, 2005, the Seventh Circuit approved of the District Court's exclusion of the post-sentencing conduct and affirmed the Petitioners' sentences. *Re II*, 419 F.3d at 583-84, App. 21.

REASONS FOR GRANTING THE PETITION

1. The Seventh Circuit's Application of the "Depletion of the Assets Theory" Eviscerates Any Remaining Distinction Between the Ability of the Federal Government and State Governments to Prosecute Robberies and Extortion and in the Process Conflicts With the Decisions in Other Circuits.

Unlike state courts, federal courts are courts of limited jurisdiction. The Hobbs Act recognizes this balance by requiring federal prosecutors to prove that alleged Hobbs Act